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Paper No. 3

Judy Jarecki-Black
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In re Application of
Jeffrey C. Rapp
Application No. 09/877,374
Filed: June 10, 2001
Attorney Docket No. AVI-007

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: DECISION DISMISSING
: PETITION
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This is a decision on the petition filed August 14, 2001, requesting that the above-identified application be accorded a filing date of June 8, 2001, rather than the presently accorded filing date of June 10, 2001.

Petitioner asserts that the filing date was erroneously recorded as evidenced by the Certificate of Express Mail on the Transmittal sheet filed with the original application papers. It is unclear from the petition if petitioner is alleging that there is a discrepancy between the filing date accorded by the United States Patent and Trademark Office (Office) and the date-in entered by the USPS (37 CFR 1.10(c)) or that the date-in was incorrectly entered by the USPS (37 CFR 1.10(d)). Because petitioner failed to provide the Office with a copy of the Express Mail label No. EL846227475US with the petition, the Office will treat this petition under both 37 CFR 1.10(c) and (d).

Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See §1.6(a) (Emphasis added).

Consideration under 37 CFR 1.10(c)

Paragraph (c) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show a discrepancy between the filing date accorded by the Office to the correspondence and the date

of deposit as shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation, may petition the Commissioner to accord the correspondence a filing date as of the "date-in" on the "Express Mail" mailing label or other official USPS notation, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date other than the USPS deposit date;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and
- (3) The petition includes a true copy of the "Express Mail" mailing label showing the "date-in," and of any other official notation by the USPS relied upon to show the date of deposit.

The present petition lacks the showing required by item (3) above.

Petitioner did not submit a true copy of the "Express Mail" mailing label No. EL846227475US, showing the "date-in" of June 8, 2001, or any other official notation by the USPS to show the date of deposit.

Consideration under 37 CFR 1.10(d)

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) and fee(s) that constitute the correspondence prior to the original mailing by "Express Mail;" and
- (3) The petition includes a showing, which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that

came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS.

The present petition lacks the showing required by item (3) above.

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in 'Express Mail Post Office to Addressee' service prior to the last scheduled pickup for that day." In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS." Evidence from the USPS may be, for example, the Express Mail Corporate Account Mailing Statement or a statement by an appropriate official of the USPS that according to a USPS record the "date-in" on petitioner's Express Mail receipt is erroneous, accompanied by a copy of the relevant USPS record. Evidence that came into being within one day after the deposit of the correspondence as Express Mail may be, for example, a log book which contains information such as the Express Mail label number; the application number; attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of the log book entry.

As previously stated, petitioner did not supply a copy of the Express Mail label No. EL846227475US. Moreover, the USPTO's USPS Express Mail Information Database indicates that a package bearing Express Mail label No. EL846227475US was accepted by the USPS on June 10, 2001 at 3:00 AM. The Office notes that petitioner bears the burden to prove that the "date-in" was incorrectly entered on the "Express Mail" mailing label. Petitioner has not provided any direct evidence of the delivery of the present application to the USPS on June 8, 2001. Absent a true copy of the "Express Mail" mailing label or other evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail" service, which corroborates the allegation that the application was, in fact, deposited with the USPS on June 8, 2001, before the last scheduled pick-up for that day, the application will be accorded the date indicated in the Express Mail Database as the date the application was accepted by the USPS (June 10, 2001).

Accordingly, the petition is dismissed.

Any request for reconsideration must be filed within TWO (2) MONTHS of the date of this decision in order to be considered timely. See 37 CFR 1.181(f).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Office of Petitions

By hand: Crystal Plaza Four, Suite 3C23
2201 South Clark Place
Arlington, VA 22202

This file is being forwarded to Technology Center 1600 for examination in due course with the presently accorded filing date of June 10, 2001.

Telephone inquiries regarding this matter should be directed to the undersigned at (703) 306-5589.

Christina Tartera Donnell

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Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

Enclosure: USPTO's USPS Express Mail Information Database